IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA (ERIE DIVISION)

PELLEGRINO FOOD PRODUCTS, INC. Plaintiff, v. RHEON U.S.A., Defendant/Counterclaim Plaintiff, v. PELLEGRINO FOOD PRODUCTS COMPANY, INC., also known as PELLEGRINO FOOD PRODUCTS, INC., Counterclaim Defendant, and CALIFORNIA FIRST LEASING CORPORATION, Counterclaim Defendant	:	Case No.: 1:05-CV-00189 Judge McLaughlin

PLAINTIFF PELLEGRINO FOOD PRODUCTS, INC.'S RESPONSE TO COUNTERCLAIM DEFENDANT CALIFORNIA FIRST LEASING CORPORATION'S MOTION FOR CHANGE OF VENUE

Plaintiff Pellegrino Food Products, Inc. ("Pellegrino") files this response to Counterclaim Defendant California First Leasing Corporation's ("CalFirst") Motion For Change Of Venue.

I. INTRODUCTION

Pellegrino sued defendant Rheon U.S.A. ("Rheon") in this Court because Rheon, a California corporation, sold and shipped three cornucopia encrusting machines ("the machines") to Pellegrino's plant in Warren, Pennsylvania. This lawsuit was filed because the three machines did not work properly, and the parties disputed the financial arrangements. At least ten witnesses in this district, including several employees and two ex-employees of Pellegrino, will testify regarding the problems with the machines, the resulting damages, and the terms of the financial arrangement with Rheon.

Rheon counterclaimed against Pellegrino and CalFirst. Rheon claimed that CalFirst owed Rheon for the machines, or, alternatively, that CalFirst should have lent money to Pellegrino to pay for the machines. CalFirst now moves for a change of venue, mainly based on the convenience of witnesses.

Pellegrino's choice of venue, however, is clearly proper under 28 U.S.C. § 1391(a). CalFirst ignores the fact that the performance of the machines in Warren is a major, if not the major, part of this lawsuit. Several witnesses in this district will testify regarding the poor performance of the machine, as well as damages, including lost sales and profits. Transferring the case to California would cause an unfair hardship to Pellegrino and these several witnesses, and two of the witnesses (the ex-employees) are not subject to the subpoena power of the California court. In sum, CalFirst has not met its burden to show that Plaintiff's choice of forum should be disturbed.

II. CALFIRST HAS NOT MET ITS BURDEN TO DEMONSTRATE THAT TRANSFER TO CALIFORNIA IS WARRANTED

Pellegrino's choice of venue is clearly proper under 28 U.S.C. § 1391(a). "It is black letter law that a plaintiff's choice of a proper forum is a paramount consideration in any determination of a transfer request, and that choice should not be lightly disturbed… unless the balance of the convenience of the parties is strongly in favor of the defendant, the plaintiff's choice of forum should prevail." Chutte v. Armco Steel Company, 431 F. 2d 22,25 (3d Cir. 1970). Furthermore, because a plaintiff's choice of forum is to be given considerable weight, the burden on the parties seeking transfer is greater than a mere preponderance of the evidence. *Id.*

A party requesting transfer has the burden of establishing a transfer is warranted. Jumara v. State Farm Insurance Company, 55 F. 3d 873, 879 (3d Cir. 1995). The court must consider private and public interests to determine in which forum the interests of justice and convenience would be best served. *Id.* The private factors may include (1) plaintiff's choice of venue; (2) defendant's venue of preference; (3) where the claim arose; (4) relative physical and financial condition of the parties; (5) the extent to which witnesses may be unavailable for trial in one of the fora; (6) the extent to which books and records cannot be produced in one of the fora. *Id.*

The public factors may include (1) the enforceability of the judgment; (2) practical considerations that would make trial easy, expeditious or inexpensive; (3) relative administrative difficulty in the two fora resulting from court congestion; (4) local interest in deciding local controversies at home; (5) public policies of the fora; (6) familiarity of the trial judge with the applicable state law and diversity cases. *Id.*

Here, the above factors favor Pellegrino, or, at a minimum, do not strongly favor one party over the other.

(1) Plaintiff's choice of venue- Pellegrino chose this venue for several reasons. The three machines are located here, and the witnesses for plaintiff reside in this district. At least ten witnesses will testify as to the problems with the machines, the attempts to fix the machines, the resulting damages to Pellegrino (including lost sales and profits), negotiations between Rheon

and Pellegrino, and possibly negotiations between Pellegrino and CalFirst. (See affidavit of Thomas Pellegrino.) Furthermore, a viewing of the machines by the fact finder may be necessary, a factor which should also be considered. See, e.g., Quezada v. Darden Rest Inc., 139 F. Supp. 2d 666 (W.D. Pa.2001), quoting Rowles v. Hammermill Paper Company, Inc., 689 F.Supp. 494, 495 (E.D. Pa. 1988).

(2) Defendant's choice of venue- CalFirst prefers California.

(3) Where the claim arose- The claim arose in the Western District of Pennsylvania, where the machines were shipped and failed to operate properly. The dispute regarding financing of the machines arose in both districts.

(4) The relative physical and financial conditions of the parties- This factor favors Pellegrino, since both CalFirst and Rheon are large corporations compared to Pellegrino.

(5) Unavailability of witnesses- CalFirst alleges that one witness (Michael Curtis) may be unwilling to travel to Pennsylvania[1], and that another witness (Rah-Miel Mitchell) has physical difficulties with traveling long distances in an airplane. These may be factors to consider, but CalFirst has not shown that it cannot obtain and utilize videotaped deposition or trial testimony of these two witnesses. Videoconferencing of testimony is a common practice in multi-state litigation, and the Erie County Bar Association has the necessary equipment. In comparison, Pellegrino has at least ten witnesses that would need to travel to California if the transfer is granted, including the 80 year-old founder of Pellegrino, Anthony Pellegrino, who is in poor health, and two ex-employees who would not be subject to the subpoena power of the

---

[1] CalFirst did not submit any direct proof that Mr. Curtis is unwillingly to travel to Pennsylvania. Rather, CalFirst relies on an affidavit by CalFirst employee Barbara Bumblis that she is informed and believes "that Mr. Curtis has communicated to CalFirst that he would not willingly travel to Pennsylvania." (Paragraph 5)

This affidavit should not carry any weight with this Court, since it is not based on personal knowledge, and contains vague hearsay that would not be admissible in evidence. Cf. Rule 56 (e) of the F.R. Civ. P.

California courts. Therefore, contrary to CalFirst's allegations, this factor does not favor CalFirst or Rheon. If anything, this factor favors Pellegrino, because of their number of witnesses, including one witness in poor health and two ex-employees.

(6) Extent to which books and records cannot be produced in one of the fora- There has been no evidence that the location of books or records favors any party.

In addition, the public factors in Jumara either favor Pellegrino, or do not strongly favor any party.

(1) Enforceability of the judgment- There is no showing that a judgment would be unenforceable in Pennsylvania or California.

(2) Practical considerations- The practical considerations here do not favor any party.

(3) Court congestion- There is no evidence that this is an issue in either fora.

(4) Local interest- The local interest in deciding local controversies favors Pellegrino.

(5) Public policies- The public policies in the fora do not favor any party.

(6) Familiarity of the trial judge with state law- This factor favors Pellegrino, since Pennsylvania law would be applicable to the dispute between Rheon and Pellegrino. California law would not be a factor here, despite CalFirst's argument. As CalFirst well knows, the lease agreement between Pellegrino and CalFirst was not executed, and therefore the forum clause of the lease agreement will not be an issue. Even if it was an issue, the necessity to apply foreign law is given little weight in reviewing the merits of a motion to transfer. See, e.g., Daily Express, Inc. v. Northern Neck Transfer Corporation, 483 F. Supp. 916 (M.D. Pa. 1979).

III. CONCLUSION

Pellegrino's choice of forum must prevail since CalFirst has not met its burden to show that transfer is warranted.

Respectfully submitted,

/s/ John J. Mead

John J. Mead, Esquire
Suite 800 Renaissance Centre
1001 State Street
Erie PA 16501
(814) 459-1726

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA (ERIE DIVISION)

PELLEGRINO FOOD PRODUCTS, INC. Plaintiff, v. RHEON U.S.A., Defendant/Counterclaim Plaintiff, v. PELLEGRINO FOOD PRODUCTS COMPANY, INC., also known as PELLEGRINO FOOD PRODUCTS, INC., Counterclaim Defendant, and CALIFORNIA FIRST LEASING CORPORATION, Counterclaim Defendant	:	Case No.: 1:05-CV-00189 Judge McLaughlin

AFFIDAVIT OF THOMAS PELLEGRINO

1. My name is Thomas Pellegrino, and I am the president of Plaintiff Pellegrino Food Products, Inc.

2. I am aware of the facts in this lawsuit.

3. If the lawsuit would proceed to trial, Pellegrino would call several witnesses from the Warren, Pennsylvania area to testify at trial regarding the purchase and use of the machines, the problems with the machines, attempts to fix the machines, damages caused by the improper functioning of the machines (including lost sales and profits), negotiations with Rheon, and possibly negotiations with CalFirst. These witnesses include myself, my 80 year old father

Anthony Pellegrino, Sally Pellegrino, Debra Davies, Richard Mack, John Hoffman, Mike Fisher, Sue Tryon, and ex-employees Robert Whitman and John Stevenson.

4. My father is 80 years old and is in poor health, and traveling to California would be a severe physical hardship for him.

5. Mr. Stevenson and Mr. Whitman are witnesses who reside in the Warren area, but are no longer employed by Pellegrino.

6. The cornucopia encrusting machines in this lawsuit are located in Pellegrino's plant. The machines are large (approximately 2,000 pounds) and difficult to move. If this lawsuit would proceed to trial, I believe it would be beneficial for the fact finder to view these machines in Pellegrino's plant.

7. I don't know any attorneys in California, and it would be a financial hardship for Pellegrino to locate and hire an attorney in California, and then have the new attorney become familiar with the facts of this case.

I declare under penalties of perjury that the above is true and correct.

/s/ Thomas Pellegrino
Thomas Pellegrino

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA (ERIE DIVISION)

PELLEGRINO FOOD PRODUCTS, INC. Plaintiff, v. RHEON U.S.A., Defendant/Counterclaim Plaintiff, v. PELLEGRINO FOOD PRODUCTS COMPANY, INC., also known as PELLEGRINO FOOD PRODUCTS, INC., Counterclaim Defendant, and CALIFORNIA FIRST LEASING CORPORATION, Counterclaim Defendant	:	Case No.: 1:05-CV-00189 Judge McLaughlin

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 7, 2005, a true and correct copy of the Plaintiff and Counterclaim Defendant Pellegrino Food Products, Inc.'s, Response to Counterclaim Defendant CalFirst's Motion for Change of Venue was filed this date in the above captioned matter and was duly served upon the following by electronic service:

Robert J. Tribeck, Esquire
Rhoads & Sinon LLP
One South Market Square, 12th Floor
Harrisburg, PA 17108-1146

And by service of original process pursuant to Federal Rule of Civil Procedure 4, upon:

John Pendleton, Esq.
Lisa S. Bonsall, Esq.
McCarter & English, LLP
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102

Respectfully submitted,

/s/ John J. Mead
John J. Mead, Esquire
Suite 800 Renaissance Centre
1001 State Street
Erie PA 16501
(814) 459-1726